

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
8

9 LEAH S. RAPPE,

10 Plaintiff,

11 v.
12

13 CAROLYN W. COLVIN,
14 Commissioner of Social Security,

15 Defendant.
16

No. 1:14-CV-03195-JTR

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

17 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
18 Nos. 14, 19. Attorney D. James Tree represents Leah Rappe (Plaintiff); Special
19 Assistant United States Attorney Ryan Lu represents the Commissioner of Social
20 Security (Defendant). The parties have consented to proceed before a magistrate
21 judge. ECF No. 7. After reviewing the administrative record and briefs filed by
22 the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary
23 Judgment; **DENIES** Defendant's Motion for Summary Judgment; and
24 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
25 42 U.S.C. § 405(g).

26 **JURISDICTION**

27 Plaintiff filed applications for Supplemental Security Income (SSI) and
28 Disability Insurance Benefits (DIB) on October 18, 2011, alleging disability since

1 September 13, 2011. Tr. 158-66. The applications were denied initially and upon
2 reconsideration. Tr. 107-10, 113-16. Administrative Law Judge (ALJ) John W.
3 Rolph held a video hearing on April 30, 2013, at which Plaintiff, represented by
4 counsel, testified as did vocational expert (VE) Fred Cutler. Tr. 35-68. The ALJ
5 issued an unfavorable decision on May 17, 2013. Tr. 17-32. The Appeals Council
6 denied review. Tr. 1-6. The ALJ's May 2013 decision became the final decision
7 of the Commissioner, which is appealable to the district court pursuant to 42
8 U.S.C. § 405(g). Plaintiff filed this action for judicial review on December 22,
9 2014. ECF Nos. 1, 4.

10 **STATEMENT OF FACTS**

11 The facts of the case are set forth in the administrative hearing transcript, the
12 ALJ's decision, and the briefs of the parties. They are only briefly summarized
13 here.

14 Plaintiff was 31 years old at the time of the hearing. Tr. 70. Plaintiff
15 graduated from high school. Tr. 40. The last time Plaintiff worked full time was
16 in 2011 as a dietary cook at a nursing home. Tr. 40-42. On account of neck and
17 lower back pain, Plaintiff cut back to working part time, but eventually had to stop
18 working altogether. Tr. 41-42. Plaintiff attempted to do part time work at H&R
19 Block in January 2013, but had to stop working because of back pain. Tr. 42-43.
20 Plaintiff testified that she would miss work one to two days a week. Tr. 43.

21 Plaintiff testified that her back pain prevents her from being able to do full
22 time work. Tr. 47. On a scale of one to ten, Plaintiff rates her daily pain as a
23 seven or eight. Tr. 50. Once every couple of months, her back pain intensifies and
24 extends down her legs and into her feet. Tr. 44-45. Plaintiff testified that she
25 experiences numbness in her hands, with the right hand worse than the left. Tr. 45.
26 Pain and numbness in her hands affects Plaintiff's ability to drive, talk on the
27 phone, and cook. Tr. 46. Plaintiff testified that she used to take hydrocodone and
28 cyclobenzaprine, but stopped taking these medications when she became pregnant.

1 Tr. 47.

2 Plaintiff testified that she has to lay down and take naps a couple times each
3 day. Tr. 50. Plaintiff sometimes wears a back brace to do housework or other
4 activities. Tr. 50. Plaintiff testified that she helps her mother and sister with some
5 household chores. Tr. 51. Plaintiff testified that she cannot lift more than ten
6 pounds. Tr. 51. Plaintiff testified that she cannot stand for longer than half an
7 hour or walk for more than ten minutes. Tr. 52. On bad days, Plaintiff has to lie
8 down for most of the day. Tr. 54.

9 STANDARD OF REVIEW

10 The ALJ is responsible for determining credibility, resolving conflicts in
11 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
12 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
13 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
14 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
15 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
16 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
17 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
18 another way, substantial evidence is such relevant evidence as a reasonable mind
19 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
20 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
21 interpretation, the court may not substitute its judgment for that of the ALJ.
22 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
23 evidence will still be set aside if the proper legal standards were not applied in
24 weighing the evidence and making the decision. *Browner v. Secretary of Health*
25 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
26 supports the administrative findings, or if conflicting evidence supports a finding
27 of either disability or non-disability, the ALJ's determination is conclusive.
28 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon claimants to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once claimants establish that physical or mental impairments prevent them from engaging in their previous occupations. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If claimants cannot do their past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimants can make an adjustment to other work, and (2) specific jobs exist in the national economy which claimants can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an adjustment to other work in the national economy, a finding of “disabled” is made. 20 C.F.R. §§ 404.1520(a)(i-v), 416.920(a)(4)(i-v).

ADMINISTRATIVE DECISION

On May 17, 2013, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act. Preliminarily, for purposes of Plaintiff’s DIB application, the ALJ found that Plaintiff met the insured status requirements of the Social Security Act through June 30, 2014. Tr. 22.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since September 13, 2011, the alleged onset date. Tr. 22.

At step two, the ALJ determined Plaintiff had the following severe impairment: lumbar, cervical and thoracic spine problems with neck pain/cervicalgia. Tr. 22.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 23.

At step four, the ALJ assessed Plaintiff's residual function capacity (RFC) and determined she could perform light work with the following limitations:

She is able to lift up to 20 pounds occasionally, lift and carry up to 10 pounds frequently in light work as defined by the regulations. She must be allowed to sit or stand alternately at 30-minute intervals for 2 to 5 minutes, during which time she can remain on task. She may frequently climb ramps and stairs, balance, kneel, and crouch; she may occasionally stoop and crawl. She may never climb ladders, ropes or scaffolds. She may occasionally reach overhead with the bilateral upper extremities. She must avoid more than occasional exposure to extreme cold, vibration, and hazards such as moving machinery and unsecured heights.

Tr. 23. The ALJ concluded that Plaintiff was not able to perform her past relevant work. Tr. 26.

At step five, the ALJ determined that, considering Plaintiff's age, education, work experience and RFC, and based on the testimony of the vocational expert, there were other jobs that exist in significant numbers in the national economy Plaintiff could perform, including the jobs of cashier II, agricultural sorter, and final assembler. Tr. 26-27. The ALJ thus concluded Plaintiff was not under a disability within the meaning of the Social Security Act at any time from September 13, 2011, through the date of the ALJ's decision. Tr. 27.

ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff contends the ALJ erred by (1) finding Plaintiff's symptom reporting testimony less than fully credible, and (2) rejecting the opinion of Plaintiff's treating physician, Troy Witherrite, M.D.

DISCUSSION

A. Credibility

Plaintiff contests the ALJ's adverse credibility determination. ECF No. 14

1 at 7-15.

2 It is generally the province of the ALJ to make credibility determinations,
3 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
4 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
5 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
6 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
7 1273, 1281 (9th Cir. 1996). "General findings are insufficient: rather the ALJ
8 must identify what testimony is not credible and what evidence undermines the
9 claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

10 The ALJ found Plaintiff not fully credible concerning the intensity,
11 persistence, and limiting effects of her symptoms. Tr. 24. The ALJ reasoned that
12 Plaintiff was less than credible because her symptom reporting was contrary to (1)
13 the objective medical evidence and Plaintiff's treatment record, (2) the fact that
14 Plaintiff's condition improved with treatment, (3) the fact that Plaintiff did not seek
15 treatment after March 2012, (4) the fact that Plaintiff worked during the period of
16 her alleged disability, (5) Plaintiff's activities of daily living, (6) Plaintiff's
17 sporadic work history, and (7) the fact that Plaintiff inconsistently reported her
18 marijuana use.

19 **1. Contrary to objective evidence and treatment record**

20 The ALJ noted that Plaintiff's allegations of neck and back pain were
21 inconsistent with the treatment record. Tr. 24. The ALJ cited to September 2011
22 treatment records in which Plaintiff complained of back and neck pain, but
23 exhibited normal strength, normal sensation and normal deep tendon reflexes of
24 the upper and lower extremities and negative straight leg raise. Tr. 24 (citing Tr.
25 338-40). The ALJ cited to MRIs showing moderate C5-6 disc protrusion causing
26 moderate central canal narrowing and mild central disc protrusion. Tr. 24 (citing
27 360-61). The ALJ found medical evidence did not support that Plaintiff needed to
28 lie down during the day. Tr. 25 (citing Tr. 380). Likewise, the ALJ found

1 evidence did not support Plaintiff's complaints of hand numbness. Tr. 25 (citing
2 Tr. 336-62, 368).

3 Although it cannot serve as the sole ground for rejecting a claimant's
4 credibility, objective medical evidence is a "relevant factor in determining the
5 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261
6 F.3d 853, 857 (9th Cir. 2001).

7 The ALJ did not err in finding that medical evidence failed to support
8 Plaintiff's testimony that she needs to lie down during the day. Dr. Witherrite
9 explicitly stated that Plaintiff did *not* need to lie down during the day. Tr. 380.
10 Plaintiff argues that Dr. Witherrite's opinion was rendered prior to Plaintiff's
11 pregnancy, which prevented her from taking pain medication. ECF No. 14 at 9.
12 But as discussed *infra*, just because Plaintiff was unable to take prescription pain
13 medication does not mean that alternative treatment was not available to Plaintiff.
14 Other than her own testimony, no evidence supports her need to lie down during
15 the day.

16 The Court agrees with Plaintiff that her MRIs, and the aggressive treatment
17 she received upon her doctors' review of the MRI results, seem to support her
18 allegations of back and neck pain. ECF No. 14 at 8-9. The Court further agrees
19 with Plaintiff that the ALJ's citation to treatment notes may have been overly
20 selective. *See* ECF No. 20 at 4 (citing Tr. 376). On remand, the ALJ shall
21 reevaluate the medical evidence, including the treatment notes supporting more
22 severe limitations as alleged by Plaintiff. *See, e.g.*, Tr. 376.

23 The ALJ found Plaintiff's complaints of hand numbness unsupported by the
24 evidence. Tr. 25. The ALJ noted, "There are references to past diagnosis of carpal
25 tunnel syndrome in the treatment record but no evidence of current findings of
26 symptoms." Tr. 25. Plaintiff argues that the record establishes that Plaintiff's
27 hand numbness is likely a symptom of her "disk protrusion touching the cervical
28 cord and cervicalgia"—not carpal tunnel syndrome. ECF No. 14 at 13-14 (citing

Tr. 229, 336, 380). Plaintiff makes a valid point, but she fails to refute the ALJ's reasoning that the record does not contain evidence (other than her own testimony) that her hand numbness functionally limits her in any way. The mere diagnosis of impairment, without the assessment of associated limitations, is not enough to sustain a finding of disability. *Key v. Heckler*, 754 F.2d 1545, 1549 (9th Cir. 1985). Thus, the ALJ's reasoning is sound, regardless of whether Plaintiff's hand numbness is caused by carpal tunnel syndrome or by "disk protrusion touching the cervical cord and cervicalgia." ECF No. 14 at 14. Nevertheless, as the Court finds remand is necessary for other reasons discussed *supra* and *infra*, on remand, the ALJ should reevaluate the evidence underlying Plaintiff's hand numbness and supplement the record, if necessary.

2. Improvement with treatment

The ALJ noted that Plaintiff received a steroid injection at L5, after which she reported a complete resolution of her pain. Tr. 25 (citing Tr. 372). The ALJ noted that Plaintiff reported in February 2012 improved function and decreased cervical pain. Tr. 25 (citing Tr. 370-71). The ALJ noted that Plaintiff's doctor told Plaintiff to let the pain clinic know if Plaintiff wanted another injection. Tr. 25 (citing Tr. 368-69). As Plaintiff did not request a repeat injection, the ALJ inferred that Plaintiff had a "lack of interest in pursuing further injection." Tr. 25.

Generally, the fact that a condition can be remedied by medication is a legitimate reason for discrediting an opinion. *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).

The ALJ did not err in finding that Plaintiff's back pain was greatly improved with treatment, especially steroid injections. In January 2012, after a steroid injection a month earlier, Plaintiff reported "she literally had no pain." Tr. 372; *see also* Tr. 373 (treatment provider noting "dramatic resolution of pain" and that Plaintiff "certainly would be a candidate for repeat of [steroid injection] should her lumbar symptoms recur"). In visits to the pain clinic after her steroid

1 injection, Plaintiff's treatment providers prescribed her Vicodin, which appeared to
2 help her pain as she reported pain ratings of "3/10" in February 2012, Tr. 370, and
3 "1/10" in March 2012, Tr. 368. The fact that medication and steroid injections
4 can largely alleviate Plaintiff's neck and back pain is a specific, clear, and
5 convincing reason to discredit Plaintiff.

6 **3. Lack of treatment**

7 The ALJ noted that Plaintiff did not seek treatment for her back and neck
8 pain after March 2012, except for pregnancy-related visits. Tr. 25 (citing Tr. 383-
9 96).

10 Unexplained or inadequately explained reasons for failing to seek medical
11 treatment cast doubt on a claimant's subjective complaints. 20 C.F.R. §§
12 404.1530, 416.930; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *see also*
13 *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996) (finding the ALJ's decision to
14 reject the claimant's subjective pain testimony was supported by the fact that
15 claimant was not taking pain medication).

16 It is unclear whether the ALJ erred in using Plaintiff's failure to seek
17 medical treatment as a reason to discredit Plaintiff. Plaintiff argues that the fact
18 that she was pregnant, and unable to take pain medication explains her failure to
19 pursue further treatment for her back and neck. ECF No. 14 at 9-11. Generally,
20 the fact that a claimant becomes pregnant is not a clear and convincing reason to
21 discredit the claimant's pain testimony. *See Kelly v. Astrue*, 2012 WL 3638029, at
22 *11 (E.D. Cal. Aug. 21, 2012) ("The Court finds no rational basis to discredit
23 Plaintiff's pain testimony based upon the exercise of her fundamental right to bear
24 a child."). The Court agrees that Plaintiff's pregnancy excused her from
25 continuing her regime of pain medication. *See* Tr. 387 (nurse advising Plaintiff to
26 stop taking Vicodin at an October 2012 office visit). But nothing in the record
27 (other than Plaintiff's own testimony, Tr. 49) suggests that Plaintiff's pregnancy
28 would prevent her from seeking other treatment such as physical therapy, over-the-

1 counter medication, and steroid injections. Whether such treatment was available,
2 or potentially beneficial, to Plaintiff is outside the Court's expertise. On remand,
3 the ALJ should not use Plaintiff's lack of treatment to discredit her. Alternatively,
4 the ALJ should supplement the record to determine whether Plaintiff could have
5 pursued alternate treatments.

6 **4. Working during period of alleged disability**

7 The ALJ noted that Plaintiff worked part time on two occasions and
8 attempted certified nursing assistant (CNA) training. Tr. 25. The ALJ found
9 Plaintiff unable to perform medium level work as a cook, but stated that there was
10 "no evidence she was incapable of sustaining lighter type tasks." Tr. 25. The ALJ
11 found Plaintiff's "interest in CNA training suggests she felt capable of some types
12 of work activity, although this particular job was likely beyond her capacities." Tr.
13 25.

14 Generally, a claimant's ability to work can be considered in assessing
15 credibility. *Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir.
16 2009). But the fact that claimants "tried to work for a short period of time and,
17 because of [their] impairments, *failed*," should not be used to discredit claimants.
18 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th Cir. 2007). In fact, evidence
19 that claimants tried to work and failed may support the claimants' allegations of
20 disabling pain. *Id.* at 1038; *see also Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir.
21 2005) (reversing the ALJ's adverse credibility determination reasoning, in part,
22 that the fact that "[the claimant] sought employment suggests no more than that he
23 was doing his utmost, in spite of his health, to support himself").

24 The ALJ erred in using Plaintiff's work attempts to discredit her. Plaintiff
25 worked as a dietary cook at a nursing home; at first, she worked full time, but on
26 account of neck and lower back pain, Plaintiff cut back to working part time, and
27 eventually had to stop working altogether. Tr. 40-42. Plaintiff attempted to do
28 part time work at H&R Block in January 2013, but had to stop working because of

1 back pain. Tr. 42-43. Likewise, Plaintiff completed some CNA training, but could
2 not complete the program on account of her impairments. Tr. 48; *see also* Tr. 343
3 (indicating that Plaintiff was unable to “lift/move” people as required by the CNA
4 program). The ALJ found that none of Plaintiff’s work during her period of
5 alleged disability rose to the level of substantial gainful activity. Tr. 22. Nothing
6 in the record indicates that Plaintiff stopped working for reasons other than her
7 impairments. In addition, as argued by Plaintiff, the fact that Plaintiff did not
8 qualify for unemployment benefits further buttresses Plaintiff’s claim. ECF No. 14
9 at 12 (citing Tr. 41). The fact that Plaintiff tried to work, but had to stop because
10 of her impairments, is not a specific, clear, and convincing reason to discredit her.
11 *Lingenfelter*, 504 F.3d at 1038-39; *Webb*, 433 F.3d at 688.

12 **5. Daily activities**

13 The ALJ noted that Plaintiff “cares for her minor children and assists with
14 household chores.” Tr. 25.

15 A claimant’s daily activities may support an adverse credibility finding if (1)
16 the claimant’s activities contradict his or her other testimony, or (2) “the claimant
17 is able to spend a substantial part of his day engaged in pursuits involving
18 performance of physical functions that are transferable to a work setting.” *Orn v.*
19 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair*, 885 F.2d at 603). “The ALJ
20 must make ‘specific findings relating to [the daily] activities’ and their
21 transferability to conclude that a claimant’s daily activities warrant an adverse
22 credibility determination.” *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th
23 Cir. 2005)). A claimant need not be “utterly incapacitated” to be eligible for
24 benefits. *Fair*, 885 F.2d at 603.

25 The ALJ erred in using Plaintiff’s ability to care for her children and do
26 household chores to discredit her. The ALJ failed to note how Plaintiff’s
27 testimony was inconsistent with performing these activities and made no findings
28 concerning how these activities involved tasks transferrable to a work setting.

1 Plaintiff's testimony does not rule out the possibility that she can do some
2 activities. Moreover, Plaintiff testified that her mother helps her take care of her
3 children, Tr. 44, and her son needs to help her with grocery shopping, Tr. 51.
4 Without more detailed findings, the fact that Plaintiff can care for her children and
5 do certain household chores is not a specific, clear, and convincing reason to
6 discredit her.

7 **6. Minimal work history**

8 The ALJ noted Plaintiff's "credibility is undermined by her poor work
9 history, which has been minimal and sporadic." Tr. 25 (citing Tr. 167-75).

10 An ALJ's finding that a claimant had limited work history and "ha[d] shown
11 little propensity to work in her lifetime" is a specific, clear, and convincing reason
12 for discounting the claimant's testimony. *Thomas v. Barnhart*, 278 F.3d 947, 959
13 (9th Cir. 2002).

14 Plaintiff argues that she has worked every year since 1999 (except 2002 and
15 2003), and, contrary to the ALJ's finding, she has had "a fairly stable work
16 history." ECF No. 14 at 11 (citing Tr. 170). Plaintiff's interpretation of her work
17 history is not unreasonable. But in this instance, where the Court does not have the
18 expertise to determine what constitutes a minimal work history, the Court must
19 defer to the judgment of the ALJ. *Tackett*, 180 F.3d at 1097. As found by the
20 ALJ, Plaintiff has had many different jobs over the course of her life, but her
21 earnings from most jobs have been mostly minimal, which indicates that her work
22 history is somewhat "minimal and sporadic." Tr. 25. Thus, this was a specific,
23 clear, and convincing reason to discredit Plaintiff.

24 **7. Inconsistent reporting of marijuana use**

25 The ALJ noting that "[a]lthough [Plaintiff] testified she has not used
26 marijuana for a couple of years, treatment records from March 2012 reflect she had
27 abstained for 5 to 6 weeks at that time." Tr. 25 (citing Tr. 368).

28 An ALJ may consider evidence of a claimant's substance use in assessing

1 credibility. *Thomas*, 278 F.3d at 959 (ALJ's finding that claimant was not a
2 reliable historian regarding drug and alcohol usage supports negative credibility
3 determination); *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999)
4 (conflicting or inconsistent testimony concerning alcohol or drug use can
5 contribute to an adverse credibility finding).

6 Substantial evidence does not support the ALJ's finding that Plaintiff
7 inconsistently reported her marijuana use. Treatment records indicate that Plaintiff
8 tested positive for marijuana in December 2011, Tr. 375, and last used marijuana
9 in approximately January 2012. *See* Tr. 368, 370. At the April 30, 2013 hearing,
10 Plaintiff testified that she last used marijuana a "couple" years prior to the hearing,
11 or around 2011, to help alleviate her pain. Tr. 49. The Court agrees with Plaintiff
12 that her inability to "pinpoint the exact date of her cannabinoid use" does not
13 create an inconsistency that can be used to discredit Plaintiff. ECF No. 14 at 12.
14 If, as the record suggests, Plaintiff last used marijuana in January 2012, then her
15 April 2013 testimony that she last used marijuana a couple years prior to the
16 hearing is accurate. The ALJ erred in finding that Plaintiff inconsistently reported
17 her marijuana use and by using this inconsistency to discredit her.

18 **8. Conclusion**

19 The ALJ provided some valid reasons to discredit Plaintiff including the fact
20 that Plaintiff's pain improved with treatment and her minimal work history. But
21 the ALJ's adverse credibility determination also contains a number of errors.
22 Specifically, the ALJ erred in discrediting Plaintiff on account of her unsuccessful
23 work attempts, her daily activities, and inconsistent reporting of her marijuana use.
24 The ALJ also partially erred in finding Plaintiff's neck, back, and hand pain
25 unsupported by objective evidence. Furthermore, in light of Plaintiff's pregnancy,
26 it is unclear whether her lack of treatment after March 2012 was a valid reason to
27 discredit her.

28 Given the number of errors made by the ALJ, and unresolved issues

1 regarding whether Plaintiff's credibility is diminished based on the objective
2 medical evidence and her lack of treatment, the Court finds the ALJ's
3 determination is not legally valid. *See Carmickle v. Comm'r, Soc. Sec. Admin.*,
4 533 F.3d 1160, 1162 (9th Cir. 2008) (the "relevant inquiry in this context is not
5 whether the ALJ would have made a different decision absent any error . . . it is
6 whether the ALJ's decision remains legally valid, despite such error"). On
7 remand, the ALJ shall re-assess Plaintiff's credibility consistent with this opinion,
8 supplement the record if necessary, and take into consideration all other evidence
9 pertaining to Plaintiff's claimed disability.

10 **B. Evaluation of Medical Evidence**

11 Plaintiff argues the ALJ erroneously rejected the opinions of treating
12 physician Troy Witherrite, M.D. ECF No. 14 at 15-28.

13 "In making a determination of disability, the ALJ must develop the record
14 and interpret the medical evidence." *Howard ex. rel. Wolff v. Barnhart*, 341 F.3d
15 1006, 1012 (9th Cir. 2003).

16 In weighing medical source opinions, the ALJ should distinguish between
17 three different types of physicians: (1) treating physicians, who actually treat the
18 claimant; (2) examining physicians, who examine but do not treat the claimant;
19 and, (3) nonexamining physicians who neither treat nor examine the claimant.
20 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
21 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at
22 631. The ALJ should give more weight to the opinion of an examining physician
23 than to the opinion of a nonexamining physician. *Id.*

24 When a physician's opinion is not contradicted by another physician, the
25 ALJ may reject the opinion only for "clear and convincing" reasons. *Baxter v.*
26 *Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a physician's opinion is
27 contradicted by another physician, the ALJ is only required to provide "specific
28 and legitimate reasons" for rejecting the opinion of the first physician. *Murray v.*

1 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

2 Dr. Witherrite was Plaintiff's treating physician from at least February 2011
3 to November 2011. Tr. 336, 359. In August 2012, in response to a questionnaire
4 provided by Plaintiff's counsel, Dr. Witherrite opined that Plaintiff did not need to
5 lie down during the day, but if Plaintiff attempted to work full time, she would
6 likely miss four or more days of work per month. Tr. 380-81.

7 The ALJ gave no weight to Dr. Witherrite's opinion that Plaintiff would
8 miss four or more days of work a month. Tr. 25. The ALJ found this limitation
9 was "not supported by the evidence of record, including [Dr. Witherrite's] own
10 treatment records, which reflect some thoracic tenderness but normal range of
11 motion, normal strength, and normal sensation. Tr. 25-26 (citing Tr. 336). The
12 ALJ also noted Plaintiff's lack of treatment since March 2012 and reports in which
13 she reported reduced levels of pain. Tr. 26 (citing Tr. 369, 372, 373).

14 The ALJ failed to provide specific and legitimate reasons for giving little
15 weight to Dr. Witherrite's opinions. The ALJ properly cited to inconsistencies in
16 Dr. Witherrite's treatment notes and his opinions rendered in response to Plaintiff's
17 counsel's questionnaire. Tr. 25-26 (citing Tr. 336); *see Thomas*, 278 F.3d at 957
18 (ALJ may reject a medical opinion that is "inadequately supported by clinical
19 findings"). But the Court finds the ALJ's other reasons for discounting Dr.
20 Witherrite's opinions invalid. Contrary to the ALJ's finding, the Court agrees with
21 Plaintiff that the objective evidence is mostly consistent with Plaintiff's symptom
22 reporting. Furthermore, the fact that Plaintiff reported her pain was improving in
23 January, February, and March 2012 does not necessarily contradict Dr.
24 Witherrite's August 2012 opinion that Plaintiff's impairments are often
25 debilitating.¹ Between March and August 2012, Plaintiff became pregnant and
26

27 ¹Defendant appears to be mistaken when Defendant argues, "In January
28 2012, *the same month* Dr. Witherrite offered his opinion, a clinician at the pain

1 stopped taking pain medication, which excused her from taking pain medication.
2 Thus, Plaintiff's reports of improvement, made several months prior to Dr.
3 Witherrite's opinion and before Plaintiff's intervening pregnancy, is not a specific
4 and legitimate reason to reject Dr. Witherrite's opinion. Furthermore, as discussed
5 *supra*, it is unclear whether Plaintiff's lack of treatment since March 2012 is a
6 valid basis to discredit her symptom reporting. Without further development of the
7 record, this is not a reason to reject Dr. Witherrite's opinions. Given these invalid
8 reasons, and the errors contained in the ALJ's adverse credibility determination,
9 the Court finds remand necessary for the ALJ to reassess Dr. Witherrite's opinions.

10 On a final note, as argued by Defendant, there are several reasons why Dr.
11 Witherrite's August 2012 opinions might be accorded little weight. ECF No. 19 at
12 12-16. For instance, Dr. Witherrite provides no basis for his conclusion that
13 Plaintiff would need to miss four or more days of work per month. *See Batson*,
14 359 F.3d at 1195 (ALJ may reject opinions that are "brief" or "conclusory").
15 Furthermore, the record suggests that Plaintiff last saw Dr. Witherrite in November
16 2011. Tr. 358-59. Although Dr. Witherrite presumably reviewed Plaintiff's
17 reports generated by the pain clinic, the fact that he did not treat Plaintiff for
18 almost a year prior to opining that Plaintiff would need to miss work four or more
19 days a month makes the basis of his opinion questionable. On remand, the ALJ
20 shall reassess Dr. Witherrite's opinions consistent with this opinion.

21 REMEDY

22 The decision whether to remand for further proceedings or reverse and
23

24 clinic noted Plaintiff's report that she was not using her prescribed medication
25 because she 'literally had no pain' following a recent steroid injection." ECF No.
26 19 at 15 (citing Tr. 372, 26) (emphasis added). Dr. Witherrite actually rendered his
27 opinions in August 15, 2012, several months after the pain clinic notes. Tr. 380-
28 81.

award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate where “no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

In this case, it is not clear from the record that the ALJ would be required to find Plaintiff disabled if all the evidence were properly evaluated. The ALJ shall reevaluate Plaintiff’s credibility and the opinions of Dr. Witherrite consistent with this opinion. At the new administrative hearing, the ALJ, if warranted, shall elicit the testimony of a medical expert to assist the ALJ in interpreting the medical record and determining Plaintiff’s RFC. The ALJ shall present the RFC assessment to a VE to determine if Plaintiff is capable of performing any other work existing in sufficient numbers in the national economy. The ALJ may direct Plaintiff to undergo a consultative physical examination.

CONCLUSION

Having reviewed the record and the ALJ’s findings, the Court finds the ALJ’s decision is not supported by substantial evidence and is based, in part, on legal error. Accordingly, **IT IS ORDERED:**

1 1. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
2 **DENIED**.

3 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
4 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
5 additional proceedings consistent with this Order.

6 3. Application for attorney fees may be filed by separate motion.

7 The District Court Executive is directed to file this Order and provide a copy
8 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
9 and the file shall be **CLOSED**.

10 DATED September 28, 2015.



A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE